IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO. 1274 OF 2005

Mahindra & Mahindra Ltd. ... Applicant

V/s

1.Rajshree Agro Services & Anr. ... Respondents

Ms.Nisrin K. Shinde i/b Ashwin Ankhad & Asso. for applicant
Shri G.A. Patil for respondent No.1
Mr. A.S. Shitole,APP for the State.

Coram : V.M. Kanade, J.
Dated : 01/04/2005.

P.C. :-

1 The learned counsel appearing on behalf of the applicant submits that the learned Magistrate has exercised his discretion under section 256 of Criminal Procedure Code in an arbitrary manner and, therefore, the order of dismissal is liable to be quashed.

2 Since the only question which falls for consideration is whether the order of dismissal of complaint under section 256 of the Criminal Procedure Code is validly passed or not. Leave granted. Appeal is taken up for hearing forthwith.

3 It is submitted by the learned counsel appearing on behalf of the applicant that the complainant and his counsel had remained present on all dates except the last two dates.

4 He submitted that on the date on which the complaint was dismissed, he and his client did not remain present because they were under impression that that the case was kept for hearing on 31.1.2005. He relied on the judgment of the Supreme Court in the case of **Associated**

Cement Co.Ltd. vs. Keshvanand reported in AIR 1998 Supreme Court 596. The learned counsel appearing on behalf of the respondents vehemently opposed the submission made by the learned counsel for the applicant. He has taken me through the provision of section 256 of the Criminal Procedure Code. He has also taken me through the Roznama maintained by the trial court. He submitted that trial court has properly exercised its discretion under section 256 of the Code. He relied upon judgment of the Bombay High Court in the case of M/s Lloyds Finance Limited vs. M/s SKG Solvex Ltd. & Ors. reported in 2002 ALL MR (Cri)1341 and judgment of the Supreme Court in the case of Rafiq and another vs. Munshilal and another reported in AIR 1981 Supreme Court 1400. The Supreme Court in the case of Associated Cement (supra) in para-18 has observed as under:

"Reading the Section in its entirety would reveal that two constraints are imposed on the Court for exercising the power under the Section First is, if the Court thinks that in a situation it is proper to adjourn the hearing then the Magistrate shall not a cquit the accused. Second is, when the Magistrate considers that personal attendance of the complainant is not necessary on that day the Magistrate has the power to dispense with his attendance and proceed with the case. When the Court notices that the complainant is absent on a particular day the Court must consider whether personal attendance of the complainant is essential on that day for the progress of the case and also whether the situation does not justify

the case being adjourned the Court is free to dismiss the complaint and acquit the accused. But if the presence of the complainant on that day was quite unnecessary then resorting to the step of axing down the complaint may not be a proper exercise of the power envisaged in the section. The discretion must, therefore, be exercised judicially and fairly without impairing the cause of administration of criminal justice".

5 In the present case from the Roznama it can be seen that complainant was absent on two dates only. On the earlier date i.e. on 20.11.2004 the complainant's advocate was present. He had wrongly taken down the next date as 31.1.2005 instead of 28.01.2005. Thus, only on 28/01.2005 neither the complainant nor his advocate was present. The present of the complainant was not required as affidavit of evidence was to be filed. Thus the ratio of the judgment in the case of Associated Cement (supra) was not followed. The ratio of the judgment relied upon by the counsel for the respondent is not applicable to the facts of the present case.

6 The application is, therefore, allowed. Impugned order dated 28.01.2005 is set aside. Complaint is restored to the file. The trial court is directed to decide the case as expeditiously as possible and in any case within six months . Application is allowed in above terms.

7 Parties to act on authenticated copy issued by the Registry.

(V.M.Kanade,J)